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No. 84-858

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID TARTER, et al.
Respondents
v.
WILLIAM RAYBUCK, et al.
Petitioners

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

This action was brought under 42 U.S.C. §1983. The Plaintiffs (Respondents herein) were David Tarter and his mother and father, Judy and Dennis Tarter. The Defendants were five (5) school administrators and the Board of Education of Cuyahoga Falls, Ohio.

The claim under the Civil Rights Statute was that David Tarter had been subjected to an unlawful search by the Defendant administrators. Joined with this claim was one for the false imprisonment of David and his parents. The Complaint also asked for an order compelling the Defendants school board and school administrators to allow David to reenter Cuyahoga Falls High School.

The case was tried to the United States District Court for the Northern District of Ohio, Eastern Division, Judge Dowd presiding. Respondent, David Tarter, was a student in his junior year of high school at Cuyahoga Falls. On the morning of March 3, 1981, David came to school early, before 7:30, and joined other students waiting for morning classes to start at 8:00. They were standing in an area of the school parking lot designated as a smoking area for the students.

Unknown to them the students were being watched by school administrators, including three (3) of the Petitioners (Rump, Raybuck and Spargur). They were stationed at different windows inside the building, so that they could see the students but the students could not see them. Two (2) of the three (3) were stationed in positions about forty (40) feet distant from the center of the smoking area, where the students were gathered.

From their respective positions, not one of the Defendants could get an unobstructed view of all that was going on outside. They had to relay to each other what each one could observe from his particular vantage point. There were about fifty (50) students milling around in the smoking area; and it was not yet completely light out, the surveillance going on from about 7:05 to 7:25 on an early March morning.

The Petitioners testified that while they watched, a number of students were passing around a marijuana cigarette and smoking it. They said Respondent, David Tarter,

was one of these students. David Tarter testified he was smoking a regular cigarette. The Petitioners also testified that they thought David either bought or sold — they couldn't tell which — a bag of marijuana while they were watching. David Tarter denied this.

At a signal the school officials emerged from their hiding places and descended on the students in the smoking area, rounding up about twenty (20) of them. These twenty (20) were told to follow them into the teachers' lounge.

Once inside, several of the students were told they were suspended from school. David Tarter was one of these. The Cuyahoga Falls police were called. With the police on their way to the school, David and some of the other students were asked to empty their pockets. They did. David Tarter had a pack of cigarettes.

When the police arrived two (2) students were more intensively searched and these two (2) were then taken in the cruiser to the police station. David Tarter was taken by Petitioners Raybuck and Spargur to the school clinic, a one-door room smaller than a jury-box. Petitioner, Raybuck, said he wanted to conduct another search. David Tarter was asked to remove his coat, shirt, boots and socks, and to again empty his pockets. He did, but only because, as he testified, he "was scared." Then he was told to remove his trousers. At this point Respondent, David Tarter, refused. The Cuyahoga Falls police were then called a second time and the school also called David Tarter's mother.

Some twenty (20) minutes later Mr. and Mrs. Tarter arrived at Cuyahoga Falls High School. They were taken to the clinic room where their son David was being held. When they walked in they found him sitting mostly undressed on a cot with the contents of his pockets spread out on the cot. Now in the room, in addition to Petitioners Raybuck and Spargur, were two (2) other school officials, one of them Petitioner Rump.

Respondent Dennis Tarter asked what was going on. When Petitioner Rump told him he told his son to get dressed. He said only the police had the right to search his son. Petitioner Raybuck told David not to get dressed.

Dennis Tarter said they were going to leave. He said the

police station was only one street away; that the police had had plenty of time to get there if they were coming, and if they wanted to search his son the school had his address and the police could find him at home.

Petitioner Rump stood leaning up against the door. He said they weren't going anywhere. A heated argument ensued, and Mrs. Judy Tarter became very upset and nervous and began crying. Finally, Mr. Dennis Tarter, after first getting Petitioner Rump out of the way so that they could get out the door, took his family home.

As a result of this incident, Mrs. Judy Tarter became very upset and had to have medical treatment for her nerves.

David Tarter was expelled from school for the balance of the school year. Mrs. Judy Tarter, however, had not been informed that the expulsion was only for that year. The first time she learned that he could have returned the next year was at this trial. It was on the basis of this evidence that developed at trial that the Court granted the Motion for directed verdict for the Defendants on Plaintiff's claim asking for an Order allowing reinstatement in school.

No warrant had been obtained for the search that was conducted on David Tarter.

At the close of the Tarters' case, the Defendants moved the Court for a directed verdict on all claims. The Motion was for the most part denied, but that part of the action asking for an Order to reinstate David as a student was dismissed.

The trial was completed and Briefs were submitted to the Court by both parties. The Court issued an opinion holding for the Defendants. In addition, the Court decided that the Plaintiffs' claims had no foundation and awarded attorney fees to the Defendants on their Counterclaim therefor.

Respondents appealed to the United States Court of Appeals for the Sixth Circuit in Cincinnati, Ohio. The Apellate Court affirmed the District Court's decision in favor of Petitioners but reversed the Judgment granted Petitioners on their Counterclaim. Petitioners seek a Writ of Certiorari from this honorable Court for review of that portion of the United States Court of Appeals for the Sixth Circuit's decision reversing the award of reasonable attorney fees to Petitioners.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Sixth Circuit correctly applied *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (p. 978) when it held that Petitioners were not entitled to an award of attorney fees.

ARGUMENT

Respondents take exception to Petitioners' claim that this matter presents critical questions of federal law concerning the award of attorney fees to prevailing parties in Civil Rights litigation (42 U.S.C. §1983). It is the contention of Respondents that the constitutional issue concerning the lawfulness of the search of Respondent, David Tarter, has been the critical issue throughout this matter. While unhappy with the determinations made by the lower courts on this issue Respondents have accepted same and do not challenge such herein. We merely suggest that the outcome on that issue was not as easily perceptible at the initiation of Respondents' suit as current hindsight might indicate it should have been. Respondents are in absolute disagreement with Petitioners that their suit was frivolous and unreasonable, especially since same concerned the ever-changing and continually evolving doctrines of the law of search and seizure.

Prior to analyzing the applicable law a word must be directed to Petitioners' voiced concerns for financially troubled Boards of Education. While financial trouble more frequently results from bad management then the attempted vindication of violated civil rights to say that the Petitioners are entitled to recover their legal fees in this particular suit due their financial problems is a step we would urge this Court to hesitate to take. To punish these particular Petitioners (more financially troubled than Respondents) by compelling payment of Petitioners legal fees and Court expenses for the policy purpose so nobly suggested by Petitioners would, in our estimation, make an example of litigants undeserving of such who proceeded without malice herein and who have been taxed with costs at all levels of these proceedings. However noble the purpose of preventing

frivolous suits might be this is certainly not the case in which to adopt the doctrine urged upon the Court by the Petitioners. The analytical disagreement between the two lower courts on the search issue alone indicates the debatability of Respondents' contentions and in light of such their suit can hardly be classified as frivolous and unreasonable.

The Court of Appeals correctly analyzed *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), *Hughes v. Rowe*, 449 U.S. 5 (1980) and a plethora of cases concerning this issue in deciding that the District Court had abused its discretion. As the Court of Appeals points out on pages 19 and 20 of its decision (_____ F.2d at _____, Petitioners App. A., p. A-34 and A-35):

> As previously stated we are not inclined to resolve this case on the finding that David Tarter freely consented to the search. In examining this claim in light of standards enunciated in *Christiansburg*, we hold the district court abused its discretion in awarding attorneys fees to defendants in this case. First, we cannot conclude that this action was wholly meritless or without foundation. See *Christiansburg*, supra. We specifically note that the issue of a student's fourth amendment rights in the context of a search by a school official is not a well settled area of the law in the country or in this circuit. This factor mitigates against an award to defendants. See *Reichenberger*, supra. Indeed, the United States Supreme Court has scheduled for reargument next term a case which may address directly a factual situation not unlike the case at bar. The question the Court has directed to be considered in ordering reargument is essentially whether an assistant principal violated a student's fourth amendment rights when he searched her purse based upon information from a teacher that the student had been smoking in the girl's bathroom in contravention of school rules. See *New Jersey v. T.L.O.*, 52 U.S.L.W. 3935 (June 26, 1984) scheduling the case for reargument.[9] Finally, as suggested in

Reichenberger, supra, the district court did make a finding that the suit was frivolous under the *Christiansburg* guidelines. However, we cannot conclude the record adequately supports such a finding. The district court's analysis of the award with respect to the fourth amendment claim was limited only to his determination that because consent was freely given, plaintiff's claim was groundless. 556 F. Supp. at 632. As we have previously discussed, plaintiff's case was not so easily resolved. Although plaintiff's claim ultimately proved unsuccessful, it was not so meritless or without foundation that defendant was properly awarded attorney's fees as the prevailing party in this case in light of the legislative history behind section 1988, the Civil Rights statutes, and the *Christiansburg* standards enunciated by the Supreme Court.

Christiansburg warns that judges not engage in *post hoc* reasoning to justify such an award. 434 U.S. at 422. "Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Id. "Decisive facts may not emerge until discovery or trial." Id.

We conclude this lawsuit is the type of case contemplated by the Supreme Court in enunciating the words of caution just quoted. The issue of consent was reasonably in dispute given the context of the purported waiver of important constitutional rights. The exact nature and extent of a student's fourth amendment rights are not well settled. Furthermore, there is no definitive standard established on when school officials may undertake incursions on traditional fourth amendment protections, in order to maintain school order and discipline. Also, the presence of the police at the high school surrounding the time of the incident in question raised a legitimate question of whether the standard of conduct of the school officials was

> the same as for police officials. That the district court or this court ultimately declined to adopt the positions urged by plaintiffs on these questions is not tantamount to concluding defendants are entitled to an attorneys fees award under section 1988.
>
> We hold therefore, that the district court abused its discretion in awarding defendants judgment on their counterclaim for attorney's fees pursuant to 42 U.S.C. § 1988.

Respondents are in total agreement with the Court of Appeals analysis.

Other matters should be considered by this honorable Court before accepting jurisdiction of this case. Although the District Court ultimately ruled the Respondents' suit to be frivolous, the same Court, in part, overruled Petitioners' Motion for a Directed Verdict. At that time it can be argued that the District Court clearly did not consider this to be a frivolous and unreasonable suit. Neither did Respondents seek a Motion for Summary Judgment. Had they done so their expenses (were their claim of frivolity capable of substantiation) would have been minimized. Should they now be allowed to profit at Respondents' expense for allowing a frivolous case to proceed to trial?

In the case of *Hughes v. Rowe*, 449 U.S. 5 (1980) this Court refused to impose an award of attorney fees against the Plaintiff even though there had been a judgment on the pleadings against Plaintiff and though attorney fees had been granted by the lower court, citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

Respondents urge this honorable Court to refrain from taking the step Petitioners would have this Court take. Jurisdiction should be denied herein.

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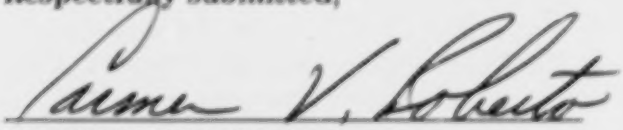
[9]As noted, *supra* at Note 3, the issue was not initially before the Court. Rather the issue initially presented was only whether the exclusionary rule applied where the state sought to introduce that evidence in a subsequent criminal proceeding.

CONCLUSION

Respondents urge this Court to deny Petitioners' Writ of Certiorari.

Respectfully submitted,



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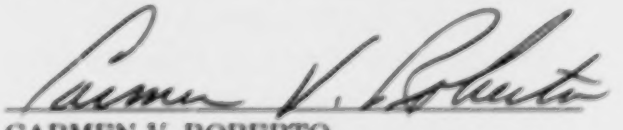
CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondents' Brief in Opposition to Petitioners' Writ of Certiorari was sent by regular U.S. Mail on February 13, 1985 to Dennis M. Whalen, Counsel of Record for Petitioners, and G. Frederick Compton, Jr., counsel for Petitioners at the Dennis M. Whalen Co., L.P.A., 135 Portage Trail, P.O. Box 8, Cuyahoga Falls, Ohio 44222.



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